UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re:	)	Case No. 98-50528-MM
	)	
MATTHEW B. CASSEDY,	)	Chapter 13
	)	
Debtor.	)	Ruling Date: March 17, 1999

ORAL RULING SUSTAINING OBJECTION TO CONFIRMATION FOR FAILURE TO COMPLY WITH 11 U.S.C. § 1322(a)(2)

This matter comes before the Court on the Objection to Confirmation of Plan filed by Lynette Stevens. The basis for the Objection is that Debtor's plan of reorganization violates 11 U.S.C. § 1322(a)(2) because it fails to provide for the full payment of $28,000 in fees awarded on September 29, 1997 to Stevens' attorneys by the Orange County Superior Court. For the reasons stated below, the Court sustains the Objection and denies confirmation of the plan.

The Debtor and Stevens have been engaged in contentious domestic relations litigation for several years. One of the more recent matters to come before the Orange County Court in this litigation concerned an order to show cause regarding modification of child support and an order to show cause regarding contempt. On September 25 and 29, 1997, the Orange County Court heard arguments of counsel, offers of proof and testimonial evidence regarding both the modification OSC and the contempt OSC, and at the conclusion of the hearing the Court entered several orders regarding these matters.

The Court found the Debtor guilty of six counts of contempt for failure to pay child support, and sentenced him to jail for a total of 30 days. The sentence was suspended for a period of three years on the condition that he pay the child support arrearages. The Court also reduced the amount of the Debtor's monthly support payments. Most importantly for the purposes of this ruling, the

Orange County Court awarded $14,000 in attorneys' fees to each of Stevens' two attorneys for a total of $28,000 in fees and costs. The Debtor was ordered to pay this amount by April 1, 1998, or face punishment for violation of a condition of his probation. The Debtor subsequently filed for protection under Chapter 13 of the Bankruptcy Code on January 23, 1998.

The question before this Court is whether the $28,000 in attorneys' fees is nondischargeable under 11 U.S.C. § 523(a)(5) and therefore a priority claim that must be paid in full under the Debtor's plan of reorganization. In order to answer that question, the Court must first determine the nature of the claim. Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984). Whether a debt is in the nature of support is a matter of federal bankruptcy law. In re Leibowitz, 1999 WL 118169, *3 (9th Cir. BAP 1999). The characterization of the debt by the particular state law under which the obligation was created is a relevant but not dispositive factor for the Court's consideration. In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

In the instant case, the Debtor had previously been ordered to pay child support, which he failed to do. Stevens was obligated to appear in court and obtain an order requiring payment of the support. In her efforts to collect the support due to the child, she incurred hefty attorneys' fees. The Orange County Court had the discretion to order the Debtor to pay those fees, and it did so under California Family Code Section 270: "If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay."

Before ordering the payment of fees, the Orange County Court heard the arguments of counsel as to whether the fee payment should be a condition of the Debtor's probation and whether he had the ability to pay such an award. The Court first heard from Debtor's attorney, who concluded that "[t]here is no finding he has the ability. He has the ability to make the child support

payments but to have him go into custody at some future date for his failure to pay a large amount of attorney fee orders I think would be unconscionable." Tr. at 37.

Stevens' attorneys responded by arguing that the Debtor was "running around and hiding behind his mother and his stepfather and putting money in their accounts . . . voluntarily quitting work and going through and living a comfortable life by mixing, taking monies from his mother's account and stepfather's account and putting it through his wife's accounts and his account. We've shown you how the Monday [sic] traces. We have two months alone where he's taken $7,000 a month net income. He has access to money. He holds the key to the jail." Tr. at 37-38.

The Orange County Court had noted previously that Cassedy had a gross monthly income of at least $2,600, and had received as exhibits bank statements showing the movement of funds among various accounts. The Debtor has argued that there is no evidence that the Court considered his ability to pay. That argument is flatly contradicted by the transcript of that hearing. Furthermore, the Orange County Court presumably knew its responsibilities under the Family Code, and knew that a consideration of ability to pay was required.

In Zimberoff, 91 B.R. 839 (Bankr. N.D. Ill. 1988), one spouse hired an attorney to enforce payment of child support from the debtor spouse. The Illinois court awarded attorney fees to that spouse under applicable Illinois law. The statute under which fees were awarded required a consideration of the financial resources of the parties. Unlike the instant case, there was no evidence in the record that this consideration had been made, yet the bankruptcy court found "no reason to believe that the divorce court ignored its responsibilities under [the statute]." 91 B.R. at 841. Although this Court need not make the leap of faith that Zimberoff did, the case provides further support for this Court's conclusion that the Orange County Court considered the Debtor's ability to pay an award of attorney fees and consequently awarded fees under Family Code Section 270.

Since these fees were incurred in the enforcement of a child support award they are therefore in the nature of support themselves. The Debtor has argued that under the holding of Boutte v. Nears, 50 Cal. App. 4th 162 (Cal. Ct. App. 1996), this award cannot possibly be in the nature of support. In Boutte, attorney fees were awarded to the prevailing spouse in a child support modification proceeding. When the losing spouse filed for bankruptcy protection, the state court revisited the fee award and "clarified" its earlier order to provide that the fees were meant as "supplemental child support." The Court of Appeal found that the court had no authority to make an award as additional child support and reversed the order.

Boutte can be distinguished from the instant case in several respects. First, those fees were awarded under Family Code § 3652, which allows a court to award attorney fees to the prevailing party on a child support modification motion. In the instant case, the Orange County Court awarded fees under Family Code § 270. Furthermore, the Boutte court revised its order in an alleged attempt to circumvent bankruptcy law; there is no such revision here. Finally, the appeals court in Boutte stated that this award could not possibly be additional support because additional support can only be awarded by a state court under the very specific guidelines described in Family Code § 4062.

But the question here is not whether the Orange County Court could actually award attorney fees as "supplemental child support." Instead, the question is whether these fees are in the nature of support under federal bankruptcy law. How state law characterizes an award of fees is "relevant," according to Chang, but the final determination on the nature of a claim for attorney fees in bankruptcy is a matter of federal bankruptcy law. And under federal bankruptcy law, this award is in the nature of support.

This conclusion is supported by bankruptcy court precedent from this Circuit as well as decisions by courts of appeal in other circuits. In Lombardo, 224 B.R. 774 (Bankr. S.D. Cal. 1998),

the debtor sought to discharge an attorney fee award incurred in a paternity proceeding. Although in that case the state court specifically characterized the fee award as "child support," that characterization was not a dispositive factor for the bankruptcy court. Instead, the fact that the non-debtor spouse remained liable for the attorney fees was considered more important. 224 B.R. at 783. If the debtor were allowed to discharge the fee award, reasoned the court, the child would be harmed because of the increased financial pressure on the custodial parent to pay those fees. Stevens similarly remains liable for the fees and costs incurred by her attorney, and if Cassedy were allowed to discharge the $28,000 award, the person who would most directly suffer is their child.

Lombardo concluded that its holding was consistent with the BAP's decision in Gionis, 170 B.R. 675, 683 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996), which stated that "[t]he presence of a minor child is an indication the state court intended the award to be in the nature of alimony, maintenance or support."

Authority from other circuits also supports this Court's decision that the award is in fact in the nature of support and therefore nondischargeable. "It is well established that attorney's fees incurred to obtain a support award are, themselves, considered support and, when imposed against the debtor, are nondischargeable in a subsequent bankruptcy case." In re Gallegos, 1998 WL 787194, *5 (Bankr. N.D. Ill. 1998)(citing In re Rios, 901 F.2d 71, 72 (7th Cir. 1990)). See In re Macy, 114 F.3d 1 (1st Cir. 1997).

The Debtor has argued that because the fee award is payable to Stevens' attorneys rather than to Stevens or her child it is not nondischargeable under § 523(a)(5). This argument has been considered and rejected in a perfunctory fashion by numerous circuits including the Ninth, and it requires no further discussion here. See Chang, 163 F.3d at 1141; In re Kline, 65 F.3d 749, 751 (8th Cir. 1995); In re Miller, 55 F.3d 1487 (10th Cir.), cert. denied sub nom. Miller v. Gentry, 516 U.S.

916, 116 S. Ct. 305, 133 L. Ed. 2d 210 (1995); In re Spong, 661 F.2d 6, 9-10 (2nd Cir. 1981). Furthermore, Lombardo distinguished those BAP decisions that concluded otherwise, and Lombardo's reasoning is both sound and applicable herein.

Since the Court has determined that the $28,000 fee award is in the nature of support and therefore nondischargeable under section 523(a)(5), it necessarily follows that this debt is a priority claim under 507(a)(7). See Chang, 163 F.3d at 1142. As Collier notes, "[t]he language of section 507(a)(7) is, with one exception noted below, identical to the wording of section 523(a)(5)." Collier on Bankruptcy, p 507.09[1]. The only difference is that claims assigned to governmental agencies are nondischargeable but are not eligible for priority. Since there is no concern about assignment in the instant case because fee awards payable directly to attorneys come within the scope of § 523(a)(5), this exception is irrelevant. The $28,000 claim for attorneys' fees is a priority unsecured claim.

Section 1322(a) of the Bankruptcy Code describes the required contents of a Chapter 13 plan of reorganization. Section (a)(2) states that a plan shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim."

The $28,000 fee award is a claim entitled to priority under section 507. The holders of that claim have not agreed to any different treatment; therefore, the Debtor's plan must provide for this claim's full payment in deferred cash payments. Since the plan does not so provide, confirmation must be denied and the objection is sustained.